IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

COE D. BARNARD,
Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF CASE.

The Plaintiff in Error was indicted in the United States Circuit Court for the District of Oregon, upon the charge of perjury in the

matter of the final proof of one Charles A. Watson, upon the homestead claim of the said Watson in Gilliam county, Oregon, and upon which proof the Plaintiff in Error is alleged to have been a corroboratory witness.

The defendant demurred to the indictment, but the demurrer was overruled, and a trial was had resulting in a verdict of conviction of the defendant, with a recommendation to the mercy of the court, and resulted in the sentencing of the defendant to two years at McNeil's Island.

The questions involved in the case are as follows:

1.

WAS THE INDICTMENT SUFFICIENT.

This question is raised by demurrer and is based upon the omission of the indictment to allege either directly or indirectly that the commissioner before whom the oath is alleged to have been taken had authority to administer THIS PARTICULAR OATH, or in the alternative of this, the omission to allege that the preliminary proceedings and notice had been taken, which would have given him such authority, and made the proof a valid proof, and further

3.

upon the claim that there was not sufficient allegation that the testimony in question was material TO SUCH FINAL PROOF.

2.

That the court erred in permitting different witnesses to testify to oral statements made in a narrative way by said Charles Watson in the absence of this plaintiff in error, these questions arising on exceptions duly preserved and presented in the record.

3.

The admission of evidence of other similar (assumed) perjuries of this plaintiff in error in the matter of other proofs in relation to the homestead of other claimants in no way connected with the claim of Watson and subsequent thereto, and there not appearing to be any common system or connection between these different claims.

4.

In permitting the prosecution to cross examine the witness Stewart (called as a witness to the good reputation of the plaintiff in error) as to statements sworn to by said plaintiff in making his own homestead proof before said witness and in permitting the prosecution to offer evidence tending to show that some of said statements were false, in other words, to disprove the good character of plaintiff in error *by specific instances of alleged wrongdoing*.

5.

In permitting the government to introduce

independent testimony for the purpose of showing that the plaintiff in error had violated the law in the matter of his own final proof.

6.

In permitting the state to offer evidence tending to show that the claimant, Charles A. Watson, had made statements out of court in the absence of plaintiff in error tending to blacken and prejudice his own character and incidentally and indirectly, that of the defendant, to the effect that he, (Watson) had been run out of the country, where the claim was, for horse stealing, and that parties in that vicinity wanted him to come back, but that he was afraid to on account of such horse stealing, etc.

All of these questions except the first, are raised by exceptions to the admission of the testimoney duly embodied in the record.

7.

Error in the refusal of certain instructions asked for by the plaintiff in error at the trial. One, to the effect that the jury should not permit clamor or public opinion to influence their verdict, and two others, directing that they could not find the defendant guilty upon the falsity of certain portions of his proof not alleged to be false in the indictment.

These questions were raised by instructions duly presented at the proper time and by the exceptions to the refusal.

SPECIFICATIONS OF ERROR.

The errors upon which the plaintiff in error will specifically urge and rely for the reversal of this proceeding are

1.

First.—That the said Circuit Court erred in overruling the demurrer of the said defendant Coe D. Barnard to the indictment filed in the said cause, demurring to the said indictment.

Second.—In overruling the objection of the said defendant to the question asked the witness E. A. Putnam as follows;

Q, State whether or not there was anything in the conversation that showed, or tended to show, where Watson had been about that time or immediately preceeding it?

And in permitting the witness to answer the question as follows:

A. He said he had his foot cut at the time —he said he had been working on the Columbia River, down about St. Helens, somewhere, and said he was going home and going out to where his folks lived.

Third.—In overruling the defendant's objection to the following question asked of the witness:

Q. Did he say where that was?

And in permitting the witness to answer the same:

A. Yes, sir, out towards Forest Grove, out in Washington County.

Fourth—In overruling the defendant's objection to the following question asked of the said witness:

Q. What was the logging camp, did he state?

And in permitting the witness to answer the same:

A. It was somewheres about St. Helens, somewhers down about in there, I think it was.

Fifth.—In overruling the objection of the defendant to the question asked of one William Shepard while on the stand as a witness for the Government in said cause, the quesiton was as follows:

Q. And did he state at that time, or in connection with that same matter, while you were conversing, the reason why he didn't go back to it?

And in permitting the witness to answer the same as follows:

A. Well, he asked me how it would be for him to go back there, and I answered, if you are making a good living here and trying to be honest you had better stay where you are.

Sixth.—In overruling the defendant's objection to the following question asked the witness Shepard:

Q. What was the rest of the conversation, if any?

And in permitting the witness to answer the same as follows:

A. Well, it was about the horses he brought down. I asked him what prices he got for them, and so on.

Seventh.—In overruling the objection of the defendant to the question asked of the said witness Shepard as follows:

Q. What was the fact about their saying anything at that time about the ranch?

And in permitting the witness to answer the same as follows:

A. He said he wanted to go back and prove up.

Eighth.—In overruling the defendant's objection to the question asked of the said witness as follows:

Q. Did he say why?

And in permitting said witness to answer the same as follows:

A. He said parties wanted him to go back and prove up.

Ninth.—In overruling the defendant's objection to the question asked of the witness as follows:

Q. Did he say why?

And in permitting the said witness to answer the same as follows:

A. He said parties wanted him to go back.

Tenth.—In overruling the objection of the defendant to the following question asked the said witness:

Q. Whom did he say wanted him to go back?

And in permitting said witness to answer the same:

A. He had reference to Mr. Hendricks.

Eleventh.—In overruling the defendant's objection to the question asked the said witness as follows:

Q. And did he give you any reason as to why he would not go back?

And in permitting said witness to answer the same:

A. He didn't think the people wanted him, I guess.

Twelfth.—In overruling the defendant's objection to the question asked of said witness, as follows:

Q. Did he tell you why?

And in permitting said witness to answer the same, as follows:

A. No, he didn't tell me exactly.

Thirteenth.—In overruling defendant's objection to the question asked of said witness as follows:

Q. Did he give you any reason why?

And in permitting said witness to answer the same:

A. Well, all the reason was that there were some horses run off that spring, and he was hired to do it, and he didn't suppose the settlers wanted him to go back.

Fourteenth.—In overruling and denying the motion of the defendant to strike out the con-

versation between the said witness Shepard and Watson, on the ground that the same was incompetent and hearsay against the defendant, and to the ruling of the Court that the same was competent and relevant and admissible as bearing on the question or the residence of by Watson.

Fifteenth.—In overruling the defendant's objection to the question asked of the witness John Morgan as follows:

Q. Whereabouts?

And in permitting said witness to answer said question:

Sixteenth.—In overruling the defendant's objection to the offer of the District Attorney to show that, "At the time the witness proved up, C. D. Barnard was one of the witnesses, at that time we will show that this witness never had resided and never did reside on that claim, we will show it as a similar act."

And in holding that the same was competent and material.

Seventeenth.—In overruling the defendant's objection to the question asked the said witness as follows:

Q. What is the fact Mr. Morgan as to

who your witnesses were at the time you made this purported proof.

Eighteenth.—In overruling the defendant's objection to the final proof papers of the said John Morgan and in permitting the same to be offered, received and read in evidence.

Nineteenth.—In overruling the objection of the defendant to the question asked of the said witness Morgan as follows:

Q. Now, as to the homestead, Mr. Morgan, that is covered by Government's Exhibit "A," which you have identified, tell the Court and jury as to what is the fact as to whether or not you ever established an actual residence upon it, ever cultivated it or actually continued to reside upon it for the period set forth in this proof?

And in permitting said witness to answer the same:

A. No, I didn't live on it—I did not cultivate it.

Twentieth.—In overruling the defendant's objection to the following question asked of the witness Morgan:

Q. I notice question 12, "Have you sold, conveyed, or mortgaged any portion of the land

and if so to whom, and for what purpose," and I see the answer is written, no. At the time you made your proof what is the fact as to your having any agreement as to your claim?

And in permitting the witness to answer the said question:

A. Well I had taken the claims for the Butte Creek Company.

And in the ruling of the said Court holding said question, and answer proper and competent as tending to show system, knowledge, and intent upon the part of the defendant.

Twenty-first.—In overruling the defendant's objection to the following question asked of the witness, Morgan:

Q. What Butte Creek Company?

And in permitting the witness to answer the same, as follows:

A. The Butte Land, Livestock and Lumber Company.

Twenty-second.—In overruling the defendant's objection to the following question asked of said witness:

Q. How did you come to take it for it?

And in permitting the said witness to answer the same as follows:

A. Well, Mr. Zachary asked me to take it up and that is how I came to take it up.

Twenty-third.—In overruling and denying defendant's motion to strike out the aforesaid answer of the witness that "Well, Mr. Zachary asked me if I would take it up and that is how I came to take it up," upon the ground that the same is incompetent, and immaterial and in not allowing the said motion.

Twenty-fourth.—In overruling the defendant's objection to the question asked of the witness James S. Stewart, as follows:

Q. State whether or not you recognized it. (Government's Exhibit "A")

And in permitting the said witness to answer the same:

A. It is the homestead proof made by John Morgan before me.

Twenty-fifth.—In overruling the defendant's objection to the question asked of the said witness James S. Stuart as follows:

Q. Does it show the accompanying testimony adduced from his witnesses in reference to the same matter?

And in permitting the said witness to answer the same:

A. Yes, sir.

Twenty-sixth.—In overruling the defend-

ant's objection to the question asked of the said witness as follows:

Q. State who the witnesses were who appeared before you at the time and if not at the same time, about the same time in connection with the matter?

And in permitting the said witness to answer the same:

A. One is Robert Zachary and one is Coe Barnard.

Twenty-seventh.—In overruling the defendant's objection to the following question asked of the said witness?

Q. Inform the jury as to what the fact is as to whether the Coe Barnard is the same Coe Barnard, the defendant in this case?

And in permitting the said witness to answer the same:

A. Yes, Sir.

Twenty-eighth.—In overruling the defendant's objection to the following question asked the said witness:

Q. Who signed it?

And in permitting the said witness to answer the same:

A. Mr. Barnard.

Twenty-ninth.—In overruling the defendant's objection to the following question asked of the said witness, James S. Stewart, called as a witness for defendant on his cross-examination:

Q. What homestead do you know?

And in permitting him to answer the same:

A. The homestead described here (indicating the final proof which had been shown him.)

Thirtieth.—In overruling the defendant's objection to that part of the question asked of the said witness Stewart, on said cross-examination in which the said witness was asked to state as to what he knew as to what Coe D. Barnard had sworn, of his own knowledge, the question being as follows:

Q. What is the fact Mr. Stewart, what is the fact as to whether or not you have heard or know whether Coe D. Barnard on or about the 23d day of June, 1905, before you as United States Commissioner gave any testimony under oath in the matter before you?

And in permitting the witness to answer the same.

Thirty-first.—In overruling the defendant's objection to the admission of the final proof papers of Coe D. Barnard.

And in permitting the same to be offered as a part of the cross-examination of said witness and to be received and read in evidence therein.

Thirty-seventh.—In failing and refusing to instruct the jury as requested by the defendant as follows:

"You should not permit and clamor or public opinion, real or imagined, to prevent you from giving the defendant a fair trial, and the benefit of all reasonable doubt."

Thirty-eighth.—In failing and refusing to instruct the said jury as requested by the defendant as follows:

"No mere carelessness or recklessness on the part of the defendant in giving his evidence in the Watson final proof will sustain the charge of perjury in this case, but it will be made to appear beyond a reasonable doubt that his statements were willfully and intentionally false, and that he did not believe them to be true."

Fortieth.—In failing and refusing to instruct said jury as requested by the said defendant as follows:

"You cannot find the defendant guilty of perjury in the matter of the statement that there was about two acres in cultivation."

Forty-first.—In failing and refusing to in-

struct said jury as requested by the defendant as follows:

"You cannot find the defendant guilty in this cause on account of any falsity, real or supposed as to the statement in the proof that there was a house or fencing on the land,"

ARGUMENT.

THE DEMURRER TO THE ARGUMENT.

It is submitted to the Court that the indictment in this case was insufficient in two respects:

First, because there was no allegation that the commissioner in question had any authority TO ADMINISTER THIS PARTICULAR OATH, or take this particular proof at the time it was taken, and in the alternative of this, there was no allegation of the preliminary facts which would give him authority to take this particular proof,

And second, that it is not sufficiently shown that the testimony in question was material TO THIS PROOF.

NO ALLEGATION THAT THE COMMISSIONER WAS AUTHORIZED TO ADMINISTER AN OATH IN THIS PARTICULAR CASE. —

It is true there is an allegation that the commissioner was an officer authorized by law to

administer SUCH OATHS, but this a mere allegation of his general authority to administer oaths in the matter of homestead proofs which as a matter of law the court would take judicial notice of, without any allegation whatever.

Now in addition to this general authority to administer oaths in such cases, the officer in question must have jurisdiction, as it were, of *the particular case*, before he can lawfully take a proof or administer an oath therein.

That is, there are certain preliminary requirements of the law in each individual case that must be complied with before the commissioner has authority to take proof or administer an oath in *that particular matter.*

The Act of March 3, 1879, Chapter 192, provides:

"*That before final proof shall be submitted* by any person claiming to gener agriculture lands under the laws providing for pre-emption or homestead entries, such person shall file with the register of the proper land office a notice of his or her intention to make such proof, stating therein the description of lands to be entered, the names of the witnesses by whom the necessary facts will be established. Upon the filing of such notice, the register shall publish a notice, that such application has been made once a week for the period of thirty days, in a newspaper to be by him designated as published nearest to such land, and he shall also post

such notice in some conspicuous place in his office for the same period. Such notice shall contain the names of the witnesses as stated in the application. *At the expiration of said period of thirty days, the claimant shall be entitled to make final proof* in the manner heretofore provided by law. The Secretary of the Interior shall make all necessary rules for giving effect to the foregoing provisions."

So it is perfectly plain that before any valid proceedings can be had in the way of making final proof upon a homestead claim, and before a commissioner has any authority to take proof or administer an oath, these preliminary requirements must be complied with, namely, a notice of intention must be filed with the register of the land office stating the names of the witnesses, etc., and a notice must be published in a newspaper for a definite length of time, and another notice must be posted in the land office. *Until this is done, any attempt to make proof is a mere nullity, utterly invalid, and of no effect whatever.*

Under Section 5396 of the Revised Statutes it would have been sufficient to make a direct allegation that the commissioner in question had the authority to administer the PARTICULAR OATH upon which the perjury is based.

But here there is no such allegation and the only allegation is that of the general authority of the commissioner under the law to administer

oaths in such cases, that is in homestead proceedings, the allegation being

"came in person before Charles S. Stewart, who was then and is, the duly appointed, qualified and acting United States Commissioner for the District of Oregon, and who was and is an officer who was authorized BY THE LAWS OF THE UNITED STATES to administer an oath, and to take testimony of witnesses in the matter of an application of a claimant to make final proof upon a homestead entry of public lands of the United States in the said District of Oregon."

This is a mere general allegation of the general authority of the commissioner under the law, to take proof in such cases. There is no allegation that he had authority to administer oaths or take proof *in this particular case*, and as we have seen he did not (notwithstanding his general authority under the law to take proof in homestead cases) have the authority to administer an oath or take proof in this particular case unless the notice had been published, and the other preliminary requirements had, which gave him such authority to take proof in the particular case.

It will be found by an examination of the authorities that it is usual to allege directly that the officer had authority to "ADMINISTER SAID OATH," but here there was no such allegation, nor was there any such allegation as is required at common law, showing that the steps had been taken to give such authority.

It is perfectly clear under the authorities that one of these two methods must be followed,

and the pleader must either follow the statute and allege directly that the officer had authority to administer the particular oath in question, or the alternative common law proceeding and allege (in such cases as this) that the proper notice had been given, posted, etc., and the preliminary requirements attended to, which would give the commissioner authority to so administer the oath.

2 Bishop's New Cr. Pro. Sec. 910 & 914.

Wharton's Cr. Law (8th Ed.) Sec. 1290-91.

This is like the case where perjury before a court is charged, and the pleader simply alleges that the oath was administered by the clerk of court, "who was then and there an officer authorized by law to administer oaths," without alleging either that he had authority to administer an oath in this particular case, or that any complaint had been filed or proceedings had which would give the court jurisdiction to administer the particular oath.

The indictment then proceeds to allege in a rambling sort of a way that Stewart was then engaged in hearing testimony in the matter of the Watson final proof, and that a homestead had been filed by the said Watson,

etc.,'' containing perhaps sufficient compliance with other requirements in this regard, but no where alleging either that Stewart had authority to take this final proof, or in the alternative that any notice had been given which would give him any such authority.

It seems to us, that judged by any right reasoning the indictment was clearly insufficient in this regard. We know that it is sometimes said that in these land fraud cases ''anything goes'' and that the pleaders are not required to observe the ordinary essentials of the indictment, and that any defect in the indictment can be supplied in the evidence, but we see no reason why this should be so, or why the defendant should not have the same rights and have the same rules applied to him as in other cases, and judged by these rules we submit to the court that it is perfectly clear that the indictment in this case is absolutely insufficient and cannot be sustained.

NO SUFFICIENT ALLEGATION AS TO MATERIALITY.——Here the proposition is not so clear as in the other particular, because there is some attempt to allege the materiality of the testimony, and much rambling and somewhat incoherent matter in relation thereto, but we submit that there is no where a direct allegation that the particular testimony

alleged to be false was material TO THE FINAL PROOF IN QUESTION. The allegation is that "it was material that Stewart, the commissioner and the register and receiver of the land office at The Dalles should know and be informed from and by the said testimony, etc., etc.," and there is no allegation that it was material to the proceeding or final proof in question.

The proof in a homestead case finally goes to the Department at Washington, and is acted upon there and patent issued from there. The duties of the United States Commissioner in taking this proof are merely clerical, and the duties of the register and receiver are largely so. The taking of the final proof and the proceedings thereunder are not for their benefit, but for the benefit of the government, and we contend that the allegation in this case should have been that the testimony in question was material in and to the taking of such final proof and that this allegation should have been direct and certain, and not rambling and incoherent.

ADMISSION OF HEARSAY EVIDENCE.——Statements made by the claimant Watson out of Court.

Over the objection of the defendant the prosecution was permitted to prove alleged oral statements made by Watson tending to show that Watson did not reside upon the land in question, and therefore that the statements of the defendant in his affidavit in that regard were false:

One E. A. Putman was called as a witness and after testifying to meeting the claimant Watson, the following proceedings were had:

Q. State whether or not there was anything in that conversation that showed or tended to show where Watson had been about that time or immediately preceeding it?

To which the defendant objected as incompetent and in not any way binding upon the defendant in this cause and as hearsay and as not

the best evidence, but the objection was overruled and the defendant excepted.

The Court saying, "It is understood the question is admitted solely as bearing upon the question as to whether or not Watson did state the truth in regard to the answers that he made in making his proof."

Whereupon the witness answered, "He said he had cut his foot at the time—he said he had been working on the Columbia River, down about St. Helens, somewhere, and said he was going home, and going out to where his folks lived.

Q. Did he say where that was?

Same objection, ruling and exception.

A. Yes, sir, out towards Forest Grove, out in Washington County.

Q. What was the logging camp, did he state?

Same objection ruling and exception.

A. It was somewheres about St. Helens, somewhere down about in there, I think it was.

This testimony was obviously offered on the theory that because Watson was a claimant and because it was necessary to show that this claimant did not in fact live on the land in question, that this essential fact might be proven by the oral declarations of Watson made in the absence of the defendant, and without giving

him any attempt to cross examine said Watson.

In other words, that the prosecution might --AS AGAINST THIS DEFENDANT—prove the fact that Watson did not in fact reside on the land, and therefore that defendant's affidavit was false by *hearsay evidence.*

We submit to the court that it needs no argument to show that this was error, and that as against this defendant, the alleged fact of Watson's non-residence on the land must be proved in this same way as any other fact, by the sworn testimony of witnesses called and examined before the jury, with full opportunity for cross examination and not by oral declarations made out of court.

The fact that Watson was the claimant and that his declarations were against interest could make no difference, first, because there was no claim THAT HE WAS DEAD OR OUT OF THE STATE, and, second, because such admissions are never admissible for or against the defendant in a criminal case.

Reeves vs. State, 6 Wymg. 240, 44 Pac. 64.
Morrison vs. State, 5 Ohio 38.
Commonwealth vs. Thompson, 99 Mass. 444.
Brown vs. State, 57 Miss. 424.
State vs. Ah Tom, 8 Nev. 217.
State vs. Fletcher, 24 Ore. 295.
Smith vs. State, 9 Ala. 995.

Welch vs. State, 96 Ala. 92.
People vs. Hall, 94 Cal. 592.
Lion vs. State, 22 Ga. 399.
Kelley vs. State, 82 Ga. 441.

In the case of Morrison vs. State cited form the 5 Ohio the defendant was charged with concealing Driskell, an alleged horse thief. In order to sustain the charge it was necessary of course for the state to prove that Driskell was a horse thief, and for this purpose the declarations of Driskell were admitted in evidence. The court says:

"The proof here was not directed to make out a scienter in Morrison, but the fact of Driskells having stolen the horse. In this view, it appears to us that the court admitted the declaration of one not a party to the record, nor a confederate, to sustain a material allegation that said person was a horse thief in general terms, and that too without any proof that a horse had been in fact stolen by or from any person known or unknown. Such declarations for such a purpose we think clearly incompetent."

So in the Thompson case cited from the 99 Mass., a man and woman were indicted together for adultry and her admissions that she WAS A MARRIED WOMAN were admitted against both of the defendants. The court reversed the judgment against the other defendant saying:

"The prosecution was therefore required to prove

that the woman with whom the adulterous intercourse was had was married to another man. Her confessions of this fact was evidence against herself; but her admissions were very clearly not evidence against another person. They were not upon oath, and the defendant Thompson had no opportunity to cross-examine her upon them."

And again:

"But the admission of another person, though charged with a crime in the same indictment, is not made competent, and it would be contrary to the elementary principles of justice to allow it."

And again:

"The fact that the man and woman are charged with a joint offense, and in the same indictment, does not give to either the power to affect the other by a confession of any material part of the charge."

So in the very well considered case of Reeves vs. State cited from the 6 Wymg. 240, 44 Pac. 62, the defendant was charged with perjury in testifying that an assault was not committed by one Chandler and for the purpose of proving that Chandler had committed an assault, and that defendant's statement that he had not, was untrue, the admissions of said Chandler and also his conduct in fleeing from arrest were offered in evidence, but the court held that the admission of the testimony was error, saying:

"Chandler's guilt, if it is to be considered as an incriminating circumstance against Reavis, must be established, in the same way that all other facts are to be

established against the plaintiff in error, by the testimony of witnesses testifying from their own knowledge, and not by the declarations of Chandler, made to others, that he himself was the guilty party, in the absence of the defendant, and after the affair had terminated."

And again as to the flight:

"The same objections are pertinent to the evidence relating to Chandler's flight the day after the assault, and his exclamations after he had retired at the ranch of a witness."

Of course it was very important and entirely proper for the prosecution to show by competent evidence that Watson had spent a greater portion of his time away from the land in question, but that must be done by competent evidence either by calling Watson, and taking his testimony as to the fact subject to cross-examination by the defendant, or by calling other witnesses who knew of his absence from the land, it could not be done by mere hearsay statements of Watson, simply because he happened to be the claimant.

So the testimony of Shepard along the same line (printed record page 83 to 88, was still more prejudicial to the defendant, because this testimony must have been offered for the purpose of directly besmirching the defendant and of raising the intimation that he, with others, was implicated with the claimant in horse stealing, and had hired him to run off horses.

The testimony was deliberately put in the record by the District Attorney over the repeated objections of the defendant and held there after its scope was entirely apparent over the motion of the defendant to strike it out. This testimony (after testifying to a conversation of Watson in the absence of the defendant) was as follows:

Q. What was the fact about their saying anything at that time about the ranch?

Same objection, as incometent, not in any way bearing upon the defendant and hearsay. Objection overruled and defendant excepted.

Whereupon the witness answered, he said he wanted to go back and prove up.

Q. Did he say why?

Same objection, ruling and exception.

A. He said parties wanted him to go back and prove up.

Q. Did he say why?

Same objection, ruling and exception.

A. He said parties wanted him to go back.

Q. Whom did he say wanted him to go back?

Same objection, ruling and exception.

A. He had reference to Mr. Hendricks.

Q. And did he give you any reason as to why he would not go back?

Same ruling to objection and exception.

A. He did not think the people wanted him, I guess.

Q. Didn't he tell you why?

Same objection, ruling and exception.

A. No, he didn't tell me exactly.

Q. Did he give you any reason why?

Same objection, ruling and exception.

A. Well, all the reason was that there were some horses run off that spring and he was hired to do it and he didn't suppose the settlers wanted him to go back.

Whereupon the counsel for defendant moved to strike out the conversation between the witness and Watson on the ground that the testimony is incompetent and hearsay against this defendant.

Whereupon the Court asked, "The conver-s-tion was all with Watson?" A. Yes, sir.

The COURT.—Its revelancy may be as to the bearing on the question of residence upon the claim by Watson.

Whereupon the Court ruled that for that purpose it was competent and the defendant excepted and the exception was allowed.

There was absolutely no purpose in this testimony except to introduce before the jury

the intimation that the people up there, and presumably among them this defendant, had hired the witness to steal horses and that he was afraid to go back into the country on that account, although they wanted him to do so. If this sort of thing can be overlooked in a criminal case, then it seems that there is no length to which the prosecutor cannot safely go in a case of this kind without danger of reversal.

THE ADMISSION OF EVIDENCE OF OTHER ALLEGED PERJURIES NOT IN ANYWAY CONNECTED WITH THE ONE CHARGED IN THE INDICTMENT AND NOT TENDING IN ANYWAY TO SHOW KNOWLEDGE, DESIGN OR SYSTEM.

The defendant was charged with perjury as a witness to the final proof of Charles A. Watson on the 23d day of June, 1904, and the prosecution was permitted over the objection of the defendant to show AS A SIMILAR ACT that the defendant had on September , 1904 ——THREE MONTHS AFTER THE WATSON PROOF——been a witness for another party in relation to an entirely different claim, not shown to have been in any way connected

with the one forming the basis of this indictment, and then the prosecution was permitted over the further objection of the defendant to offer still further testimony tending to show at great length that some of the statements in the latter proof *were false.*

It is true that this court has gone a long way in recent cases in admitting testimony of collateral matters of this kind, but it is submitted to the court that it has never gone so far as this and that there must be some limit to the introduction of this kind of proof and that the testimony in this case is clearly over and beyond any possible extension of the rule.

Boyd vs. United States, 142 U. S. 450.
People vs. Sharp, 107 N. Y. 427.
People vs. Molineaux, N. Y. 61 N. E. 286.
Comm vs. Jackson, 132 Mass. 16.
Shaffer vs. Comm, 72 Pa. St. 65.
Unsell vs. State, 39 Tex. 330; 45 S. W. 1022.
Walker's Case, First Leigh Va. 574.
State vs. Godfreson, 24 Wash. 398; 65 Pac. 523.
Schazer vs. State, 36 Wis. 429.
People vs. Tucker, 104 Cal. 440; 38 Pac. 195.
McGee vs. State, Miss. 22 So. 890.
State vs. Spray, Mo. 74 S. W. 846.
Leonard vs. State, 60 N. J. Law, 8; 41 Atl. 561.
Cobble vs. State, 31 Ohio St. 100.
Ivan vs. Comm, 104 Pa. St. 218.
Long vs. State, Tex. 47 S. W. 363.

State vs. Raymond, 53 N. J. L. 260.
People vs. Fitzgerald, 156 N.J. 253; 50 N.E. 846.
State vs. Graham, 121 N. C. 623; 28 S. E. 409.
People vs. Bowen, 49 Cal. 654.
State vs. Walthers, 45 Iowa 389.
State vs. Stevens, 56 Kans. 720; 44 Pac. 992.
McAllister vs. State, 112 Wis. 496; 88 N. W. 212.

Here, the testimony could not possibly have been admissible for the purpose of showing knowledge or design at the time of the alleged perjurs for the collateral act offered was *three months subsequent* to the time charged in the indictment.

Neither was there a particle of testimony tending to show that the two alleged offenses were connected in any way or that they were a part of any system on the part of the defendant. Indeed it was not even claimed that there was any such system on the part of the defendant, but the testimony was offered simply as a "*similar act*," (statement of Mr. Bristol, printed transcript page 99 and 152-3.)

It is true that the court seems to have had the "knowledge, design system" exception to the general rule in its mind, but as we have seen there was nothing in the world to

substantiate it in this case, and it surely cannot be true that in ALL cases testimony or other similar acts are admissible under this exception. If so, the general rule is entirely destroyed and the exception has become the rule.

That seems to have been the idea of the Court below but it seems unbelieveable that this court will go so far. Surely there must be some relation shown between the two offenses—something more than the fact that they belong to the same class of crimes before the collateral accusations can be dragged in to prejudice the defendant; where as we have said there was not even a claim on the part of the prosecution of anything more than that the offenses were similar. It was clearly offered upon the theory that where a party is charged with one crime the fact that he afterwards committed a similar crime or a crime of the same character tends to increase the probability of his guilt, and this is exactly what the Supreme Court of the United States, the Supreme Court of New York and the Courts of many other states have said could not be done in the cases cited above. See also Wigmore Vol. 1, Sec. 194 P. 233 and authorities cited.

It was contended that the claimant (Morgan) in the collateral case offered in evidence had made some sort of an arrangement with the Butte Creek Land, Live Stock & Lumber Com-

pany for the sale of the claim to them, (there was no such charge in the indictment in this case) but even if there was such an agreement, there was nothing to show that the defendant knew anything about it. He was not a stockholder nor a member of the company, nor in any way interested therein. (Printed Transcript page 104) and as to the compliance with law in the matter of improvements, and cultivation in the Morgan case, there was great room for question as to whether or not the law had been sufficiently complied with.

Nevertheless the defendant was either compelled to suffer the imputation before the jury of being guilty of perjury in this other matter or else he was compelled to go into an elaborate defense involving the whole question of whether or not Morgan had complied with the law and what his defendant's knowledge and belief were in relation to that question. In other words to try out at length not only the charge in the indictment, but the question of whether or not he had been guilty of some other offense entirely distinct from it, and of which charge he had no notice prior to the actual occurrence of the trial.

Whether innocent or guilty of the subsequent collateral charge, it could not but clearly prejudice him in the minds of the jury upon the trial of the charge upon which he was indicted. The evil of admitting such testimony cannot be more forcibly presented than it is in the opinion of Mr. Justice Harlan in the Ryan case:

"No notice was given by the indictment of the purpose of the government to introduce proof of them.

They afforded no legal presumption of inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. PROOF OF TEHM ONLY TENDED TO PREJUDICE THE DEFENDANTS WITH THE JURORS, TO DRAW THEIR MINDS AWAY FROM THE REAL ISSUE." * * * * * *

"However depraved in character and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged."

And by Mr. Justice Peckham, now of the United States Supreme Court in People versus Sharpe:

"It seems to me this is nothing more than an attempt to show that the prisoner was capable of committing the crime alleged in the indictment because he had been willing to commit a similar crime long before, at another place, and for the purpose of accomplishing the commission of another act by a different person. TO ADOPT SO BROAD A GROUND FOR THE PURPOSE OF LETTING IN EVIDENCE OF THE COMMISSION OF ANOTHER CRIME IS, I THINK, OF A VERY DANGEROUS TENDENCY. It tends necessarily and directly to load the prisoner down with separate and distinct charges of past crime, which it cannot be supposed he is or will be in proper condition to meet or explain, and which necessarily tends to very gravely prejudice him in the minds of the jury upon the question of his guilt or innocence."

Devens, J., in Com. vs. Jackson, 132 Mass. 20: "The objections to the admission of evidence as to oth-

er transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him."

Allen, J., in Coleman vs. State, 55 N. Y., 70: "A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or indeed of any character. But the injustice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction of a single one."

Thayer, J., in State vs. Saunders, 14 Ore., 309: "Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs—no matter what explanation of them he attempts to make—it will be more damaging evidence against him and conduce more to his conviction than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this: knows that juries are inclined to act from impulse, and to convict parties accused upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case, if they think him a scapegrace or vagabond. That is human nature. The judge might demurely and dignifiedly tell them that they must disregard the evidence, except so far as

it tended to impeach the testimony of the party; but what good would that do? And it is not at all improbable that he himself would imbibe some of the prejudice which proof of the character referred to is liable to engender."

Hayne, C., in People vs. Dye, 75 Cal. 112, 16 Pac., 537: "In a case which is at all doubtful, such a course would be almost certain to produce a conviction for an average jury. It is contrary to the first principles of justice to try a man for one crime and convict him of that because he may be guilty of another, or because he may be a low specimen of humanity."

Holt, L. C. J., in Harrison's Trial, 13 How. St. Tr. 833, 864, 874 (charge of murder; a witness was called to speak of some felonious conduct of the defendant three years before): "Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which he has no notice? And how many issues are to be raised to perplex me and the jury? Away, away! That ought not to be; that is nothing to the matter."

It may be right to punish criminals—to be zealous and vindictive in running them down—even in the spirit of the old Mosaic Law, "an eye for an eye, and a tooth for a tooth," but in our zeal in this behalf it is surely not well to forego or forget the principles and safeguards which protect the innocent, and the presumption that every man is innocent, and that his trial is to be had upon that theory.

The record in regard to this matter is presented in the printed transcript on page 87 to page 100 and in the amendments to the bill of exceptions page 152 to 154 and is as follows:

"And be it further remembered, that during the trial of said cause and as a part of the direct case of the Government, one John Morgan was called by the Government as a witness, who testified that he had lived in Wheeler county and that he took up a claim in that county.

"Whereupon he was shown what purported to be his final proof paper upon said claim."

Here the prosecution showed the witness the final proof in the claim of the said John M. Morgan, which appears on page 88 to page 99 of the printed transcript, and which included the corroboratory affidavit of the defendant Barnard showing residence and cultivation.

And said witness testified that the said paper bore his signature, that he did not know when he signed it, but that he knew what it was and that it was his proof on his homestead, the one he had taken up.

Whereupon he was asked the following question:

Q. Whereabouts?

To which the defendant objected as immaterial and incompetent.

COURT.—What is the purpose?

Mr. BRISTOL.— The purpose of this, if your Honor pleases, is to show—and the government proposes to follow it with proof offered for the purpose of showing—a similar act on the part of the defendant,

Coe Barnard. We offer to prove by this witness that this witness took a homestead and made proof and that Coe D. Barnard was his witness, and that the witness—(Here counsel was interrupted by)

Mr. BENNETT.—I think if you are going to make a statement of this kind you should make it in writing.

COURT.—Go ahead. It is perfectly proper.

To which defendant excepted.

Mr. BRISTOL.—And that at this particular time when this witness proved up, the defendant, Coe D. Barnard, was one of his witnesses and swore to his proof, and we will follow that by showing that at that time this witness did not reside, and never had resided, on that claim—as a similar act.

COURT.—Now make your objection. It is competent testimony.

Mr. BENNETT.—We object to it as immaterial, incompetent, tending to prejudice the defendant, and in no way bearing upon any issue in this case.

COURT.—It is competent, provided it is anywhere near the time. If years elapsed, why it would not be. What time did he make his proof?

COURT.—It will be admitted. You may have your exception.

Mr. BENNETT.—Take an exception, your Honor, and let it go to all this line of proof.

Whereupon the question was asked of said witness.

Q. What is the fact, Mr. Morgan, as to who your witnesses were at the time you made this purported proof?

Same objection, and that it was not the best evidence, whereupon the Court ruled that the best evidence was the paper itself, whereupon the paper purporting to be said final proof was offered by the Government (said paper hereinbefore set forth), for the same purpose as hereinbefore set forth, to which the defendant objected as immaterial and incompetent and tending to drag in other issues prejudicial to the defendant and not connected in any way with the charge against the defendant.

But the objection was everruled and the defendant excepted, and his exception was allowed, and said document was thereupon received in evidence and marked Government's Exhibit "A."

Whereupon the witness was asked the following question by the Government:

Q. Now, as to the homestead, Mr. Morgan, that is covered by Government's Exhibit "A," which you have identified, tell the Court and jury as to what is the fact as to whether or not you ever established an actual residence upon it, ever cultivated it or actually continued to reside upon it for the period set forth in this proof?

To which there was the same objection, ruling and exception and the witness answered:

A. No, I didn't live on it—I did not cultivate it.

We submit again that the obvious and only purpose of the admission of this testimony was to drag in a collateral matter, put the defendant on his defense as to it, and if possible,

blacken him by showing that he had committed some other crime than the one charged, and that therefore he was a person likely to have committed the crime charged in the indictment, because he had at another time, as said by the learned district attorney, "COMMITTED A SIMILAR OFFENSE."

As was said by the Supreme Court of New York in the Sharpe case, it is a mere subterfuge to attempt to put this on the ground of proof of knowledge, design, or system, in a case of this kind, because there was no attempt to show any system, whatever, or anything more than these two isolated and disconnected acts, and as we have seen, it could not possibly show knowledge or design, because it was long subsequent to the alleged perjury complained of in the indictment. Surely you cannot prove knowledge and design at a given time, by disconnected, though similar, acts done months afterward.

THE RULING OF THE COURT PERMITTING THE PROSECUTION TO CROSS EXAMINE THE CHARACTER WITNESS OF THE DEFENDANT AS TO PARTICULAR ACTS OF ALLEGED WRONG DOING IN NO WAY DISCLOSED OR ALLUDED TO IN DIRECT EXAMINATION.

The defendant called as a witness to his character one James Stewart who testified in substance that he knew the general reputation of the defendant in the community in which he lived as to truth and veracity, and that his reputation in that regard was good.

On cross-examination of the witness the prosecution was permitted to ask the witness as to *his own knowledge* of said alleged acts and declarations of the defendant which were claimed to have been untruthful—i e— if the defnedant had not come before him as a United States commissioner and made false statements as to

his residence on a homestead claim upon which he was making final proof.

This was offered by the District Attorney as bearing upon the reputation of Coe D. Barnard for truth and veracity and indirectly as impeaching the statement of the witness Stewart that Barnard's GENERAL REPUTATION in the community had been good.

On the direct examination of the witness he had been confined entirely to the matter of general reputation.

It is submitted to the court that it was error for the court below to permit the prosecuting attorney to cross examine a character witness thus.

Moulton vs. State, 88 Ala. 116-120; S. C. So. 758.

Gordon vs. State, 3 Iowa 415.

Kearney vs. State, 68 Miss. 233; S. C. 8 So. 292.

Olive vs. State, 11 Neb. 1-27; S. C. 7 N. W. 444.

Patterson vs. State, 41 Neb. 538; S. C. 59 N. W. 917.

State vs. Bullard, 100 N. C. 486; 6 S. E. 191.

Tessie vs. Huntington, 23 Howard (U. S. Supreme Court) 2; S. C. 16 Co. Op. Law, Ed. 483.

Commonwealth vs. O'Brien, 119 Mass. 345.

In all of the first six of the casee cited above, the question arose exactly as in this case —upon cross examination—and in each case the lower court was reversed for the admission of such testimony.

In Moulton vs. State, cited above the Court says:

"And a witness to character cannot speak of particular acts, or even the course of conduct of the person inquired about, but is confined to a statement of general reputation in the neighborhood in which he lives. The rule applies with equal force to original and rebutting testimony. The issue is good or bad repute, and to this each party is confined. Similarly, the cross-examination of a character witness must be conducted within the limits of this inquiry." * * * *

"But this court has never held that it was proper, even on cross examination, to elicit the witness' knowledge of the conduct or of particular acts of a defendant, or other person whose character is involved in the issue; but, on the contrary, its expressions are in perfect harmony with all the text-writers who touch on the point, and with an unbroken line of cases adjudged by courts of last resort, and which are uniform to the effect that such evidence is incompetent and inadmissible. * *

"The purpose of the inquiry being to ascertain the general credit which a man has obtained in public opinion,—whether justly or unjustly, is not the question:—the evil and injustice of opening a Pandora's box of specific indictments, of which he had no opportunity to answer, would be just as great as on cross examination as on the examination in chief. The objection goes to the nature of the evidence, and not to the time or mode of its introduction."

And in Gordon vs. State, the Court says:

"It only remains to inquire whether it was correct to permit the state on cross examination of a witness who was called as to the good character of the defendant, to go into proof of particular acts or difficulties on his part? And in permitting this we think the court erred. * * * * * *

But the examination must be confined simply to the general character or reputation, and neither can ask questions as to particular facts or difficulties."

And the Supreme Court of the United States in Tessie vs. Huntington, says:

"He is not required to speak from his own knowledge of the acts and transactions from which the character or reputation of the witness had been derived, nor, indeed, is he allowed to do so, but he must speak of his own knowledge of what is generally said of him by those among whom he resides, and with whom he is chiefly conversant; and any question that does not call for such knowledge is an improper one, and ought to be rejected."

And the text books are to the same effect. Mr. Greenleaf says, Vol. 1, 14th Edition; page 558:

"BUT IN IMPEACHING THE CREDIT of a witness, the examination must be confined to his general reputation, and not be permitted as to particular facts; for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer the other without notice."

Rapalje in his work on the Law of Witnesses, page 329, says:

"But the inquiry must be confined to the general reputation of the witness; particular facts, which, if true, would impeach his character for veracity, cannot be gone into; and the reason is that every man may be supposed capable of supporting his general character, but it is not likely that he should be prepared to answer to particular facts, without notice; and unless his general character and behavior are in issue, he has no notice."

Wigmore, speaking particularly of Cross-examination, says, in Vol. 2, page 1144:

"It is to be noted that the inquiry is always directed to the witness' hearing *of the disparaging rumor* as negativing the reputation. There must be no question as to the *fact of the misconduct*, or the rule against particular facts would be violated; and it is this distinction that the Courts are constantly obliged to enforce." (Italics above are those of the author.)

We call especial attention of the court to this matter because it seems to us so plain as to be one of those things which cannot be overlooked or avoided and upon it alone, if there were no other question in the case, it seems to us the learned District Attorney could not avoid a reversal. The record so far as it is material to this matter is as follows:

And be it further remembered, that after the Gov-

ernment had rested its case, JAMES STEWART was called as a witness in behalf of the defendant and testified as follows:

DIRECT EXAMINATION.

(Testimony of James Stewart.)

Q. You have already been sworn?
A. Yes, sir.

Q. You were a witness for the Government here?
A. Yes, sir.

Q. How long have you lived in the Fossil country?
A. Sixteen years.

Q. Are you acquainted with Coe Barnard?
A. Yes, sir.

Q. How long have you known Coe?
A. I have known him for a long time.

Q. Do you know what his general reputation in the community has been for truth and varacity?
A. I do.

Q. What has it been, good or bad?
A. It has been good.

CROSS-EXAMINATION.

Q. Do you know where Barnard has lived during all this time? A. Yes, sir.

Q. Where? A. In that Fossil neighborhood.

Q. What do you mean by the Fossil neighborhood, describe it more particularly to the jury?
A. Part of the time in town and part of it on his ranch.

Q. Whereabouts is that ranch?

A. A few miles west from Fossil.

(Testimony of James Stewart.)

Q. How many?

A. About three, I should think; I am not sure about it.

Q. Is that down, the place you mean down next place known as the J. M. Barnard place on Butte Creek? A. I could not say as to that.

Q. How do you fix the place where Barnard lived? Do you know the section, township and range Mrs. Barnard pointed out as the northwest quarter of section 25, township 6 south, range 20 east?

A. I would not be sure about the section.

Q. Could you tell by looking at the map whether that was the place he lived at?

A. All I know of where he lived at is I have been down to the Barnard place about two times in my life.

Q. How many times? A. Two times.

Q. Do you know how to get there?

A. Down Butte Creek.

Q. Down Butte Creek all the way?

A. You could leave the road a little, sir.

Q. Where did you strike Barnard's place?

A. It is right on the creek.

* * * * *

Mr. BRISTOL.—Can we agree on where the Barnard place is on the map?

Q. Can you state whether or not it was in township 6 south range 20 east, on Butte Creek?

A. I am pretty sure it is there.

* * * * * *

Q. How long have you known Mr. Barnard?

A. Sixteen years.

Q. And during that time where did he live?

(Testimony of James Stewart.)

A. He lived either in Fossil or down Butte Creek.

Q. Either in Fossil or down Butte Creek?
A. Yes, Sir.

Q. I show you a paper and ask you to look at it and state whether you have ever seen it before?
A. Yes, sir.

Q. What is it?
A. It is Coe Barnard's final proof.

Q. For what? A. For his homestead.

Q. For what homestead?
A. The homestead he proved up on before me.

Q. Well, what homestead do you know?
A. The homestead described here (referring to final proof.)

Q. What homestead?
Objected to as incompetent, immaterial, not proper cross-examination. This witness was called simply as to the question as to the character of Mr. Barnard. Now, I do not see upon what theory of cross-examination they can put a paper of this kind into his hands and proceed to examine him about it and cross-examine upon that point.

COURT.—What is the purpose of this cross-examination.?

Mr. BRISTOL.—I propose to show by this witness matter affecting the reputation for truth and veracity of the defendant Coe Barnard. Nothing more, nothing less.

COURT.—Can you show it by a specific instance?

Mr. BRISTOL.—I can, your Honor. I propose to show by this witness that Coe D. Barnard, at a time before this witness as United Stated Commissioner,

swore to the fact that he had continuously resided upon a place as a homestead other than the place fixed as his place.

COURT.—I am not asking you the specific instance. I am asking you whether you can assail reputation by specific instance or whether your questions must not be confined to a general reputation?

Mr. BRISTOL.—I think, with respect to that, that generally it is confined where the matter is thought to be general without regard to any specific act, but the question in this case is this: The witness testifies generally to reputation for truth and veracity. Now, if he knows an instance or instances affecting that matter, that is, the matter concerning that part witness answered at about the same time and which entered into his estimate of the truth and veracity of the person inquired about, it would seem then to be competent, but I do not claim that you can introduce specific instances against general reputation for truth and veracity.

COURT.—That is all you can ask as to general reputation. I don't know what the best modern authority is with respect to this. There is a good deal to be said on both sides.

Mr. BRISTOL.—The Government does not wish to insist upon it if the Court feels that it is incompetent.

COURT.—You may go ahead, Mr. Bristol. Just pass this point and between now and two o'clock you can see what you want to do.

* * * * * *

The witness Stewart thereupon resumed the stand, and the Court overruled the objection to the question under consideration, to which ruling the defendant excepted.

The following question was then asked the witness:

What is the fact, Mr. Stewart, as to whether or

not you have heard or know whether Coe D. Barnard, on or about the 23d day of June, 1904, before you as United States Commissioner, gave any testimony under oath then in a matter before you?

Mr. BENNETT.—Now, we object to that part of it in which the witness is asked to state what he may know of his own knowledge.

Mr. BRISTOL.—I said "heard or know," Judge.

Mr. BENNETT.—Well, I don't object to the "heard" part of it, but what he knows, that I object to as incompetent and not proper cross-examination.

COURT.—Now, let that go over the Judge's objection and note his exception. I understand all this testimony will be objected and the exception preserved.

The witness was then shown a paper and stated that that contained the matter to which he referred and which occurred before him as a Commissioner. The witness was then handed the paper and asked to look at it and state if he knew whose signature was upon it, and he answered that it was Mr. Barnard's and that it bore his official signature as a United States Commissioner.

Mr. BRISTOL—The Government proposes to offer that part of the paper, in connection with the cross-examination of the witness, concerning the homestead proof, testimony of claimant, identified by the witness as that of Coe D. Barnard.

Objected to as incompetent, immaterial and not proper cross-examination.

Objection overruled. Exception allowed.

The paper is marked Government's Exhibit "9-A," and read in evidence. * * * * *

REDIRECT EXAMINATION.

Q. Mr. Stewart, do you know anything about how much Coe Barnard lived on his homestead claim, that he proved up on before you?

A. Nothing except what he swore to in his proof.

Q. You don't know anything about that at all?

A. No; I know absolutely nothing about it.

Q. Do you know anything about how many improvements he had on the place? A. No, sir.

Q. Do you know anything abont whether or not his family resided on the place?

A. I do not, any more than what he swore to in his proof.

Q. Do you know anything as to whether the statements made in his proof were true or false?

A. I do not.

Mr. BENNETT.—Now, your Honor, we move to strike out the final proof upon the ground that it is immaterial and incompetent, and improper cross-examination, and its only purpose can be put the defendant on trial and compel him to explain a matter which has nothing whatever to do with this case.

COURT.—Whose proof was that, that this witness testified to?

Mr. BRISTOL.—That was the proof of Coe D. Barnard, the defendant.

COURT.—On his own place?

A. Yes, sir, his own place.

Mr. BRISTOL.—On a place that he at that time was proving up on, there being evidence already it the record, offered by the defendant's witnesses in that same connection, that the family, including the defendant Barnard, never lived anywhere else than upon the home

place of Barnard's on Butte Creek during the entire period from somewhere in the neighborhood of 1898.

Motion overruled. Defendant excepts.

Record P. 105 to 110 and amendments P. 175 to 183.

It is perfectly clear then that this testimony was offered and admitted upon the theory that you could impeach the testimony of the witness Stewart and indirectly the reputation of the defendant as a truthful man by particular acts.

There are some other questions raised by the record in relation to instructions, etc,, but we have concluded to submit this case entirely upon the questions already presented.

Respectfully submitted

BENNETT & SINNOTT,

Attorneys for Plaintiff in Error.